IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

MISCELLANEOUS PETITION NO. 49 OF 1999

Maharashtra State Financial Corporation
..... Petitioner
versus
Magna Elastomeric Rollers Pvt Ltd and Ors. ..... Respondents

Ms. A. Ghone with Lakhiraj i/b. M/s. Shaunak Satpute for the petitioner.
Mr. G.R. Kimkhabwala with M.A. Shah i/b. A.G. Shah for the respondents.
K. Setalvad with M.P. Rege for the petitioner in other misc.petition.

CORAM: S.U. KAMDAR, J.
DATE : 28TH FEBRUARY, 2005.

JUDGEMENT :

1. The present petition is filed under section 31 and 31(1)(aa) and 32 of the State Financial Corporation Act, 1951. Some of the few facts of the present case are briefly stated as under :

2. A company known as Meghna Elastomerics Pvt.Ltd is a private limited company and was to set up a factory at plot no.17, Hissa no.2, survey no.80, Panchsheel Industrial Estate, within the village limits of Kharsundi, Taluka- Khalapur, District-Raigad. The company proposed to set up a plant for manufacturing rubber, rollers, Tread

rubbers and Rubber moulded articles etc. In pursuance of the said proposal an application was made by the 7th respondent to the petitioner for financial assistance to the tune of Rs.37,50,000/- for the purpose of part finance towards the cost of the project on 27.2.1992. Respondent no.1 to 6 gave their personal guarantee for repayment of the said loan amount. On the basis of the said proposal and the guarantee of Respondent nos.1 to 6 a term loan of Rs.37,50,000/- was sanctioned in favour of the 7th respondent on the various terms and conditions as set out in the letter dated 5.6.1992 issued by the petitioner herein. On 28.10.1992 an indenture of mortgage was executed by the 7th respondent and the same was lodged with the Sub-Registrar, Assurances, Bombay. The first instalment of Rs.5,54,000/- was disbursed and the balance amount of Rs.37,50,000/- was thereafter disbursed from time to time. The said amount has been duly disbursed by the petitioner to the respondent company. The said amount was repayable within a period of 8 years in 13 half yearly instalments commencing from 20.10.2000. However the company made delays in repayment of the

said amounts and thus the said amount became due and payable with interest at the rate of 21.50% p.a. payable with quarterly instalments alongwith penal interest of 3% p.a. due to defaults committed by the said company. Under the said deed of mortgage dated 28.10.1992 the respondent no.7 agreed to mortgage the right, title and interest in respect of the said amounts as well as the building standing thereon alongwith Plant and Machinery in favour of the petitioner herein. Under the deed of guarantee executed by respondent nos.1 and 6 it was agreed that in an event of default on the part of respondent no.7, the said payment will be made by the guarantors. The said guarantee was absolute and unconditional. Under the terms and conditions of the said guarantee the guarantors were also liable to make payment of the interest including the penal interest which is due and payable by the 7th respondent. It is the case of the petitioner that the respondent no.7 made defaults and thus a notice was issued under section 29 of the SFC Act calling upon the 7th respondent to repay the amount failing which they will take action of taking over the assets

of the company. However inspite of notice no money was received and thus the petitioner took possession of the assets on 8.10.1996 in exercise of power conferred under section 29 of the SFC Act. Thereafter the said assets were put for sale by inviting tenders but no offer was received. On 9.3.1988 the petitioner decided to invoke the guarantee given by the respondent no.1 to 6 and called upon the respondent no.1 to 6 to pay the entire outstanding amount which was then payable at the sum of Rs.55,80,336.50% with further interest at the agreed rate under the deed of mortgage. Inspite of the notice dated 9.3.1988 the petitioner failed and neglected to make payment and thus the present petition is filed under section 30, 31, 31(aa) and 32 of the SFC Act inter-alia seeking relief that the respondent nos.1 to 6 be ordered and directed to jointly and severally pay to the petitioner a sum of Rs.1,19,78,794.75/- which was due and payable as on the date of the filing of the petition with further interest thereon at the rate of 21% and penal interest at the rate of 3% thereon.

3. It is this petition is for hearing before me. The reply and the rejoinder are filed. Thereafter pursuant to the judgment of the apex court in the case of Central Bank of India v/s. Ravindra reported in (2002) 1 SCC 377 an additional affidavit has been filed by the petitioner. In the said affidavit details in respect of the sale of the assets of the 7th respondent which was effected on 18.3.2000 for total sum of Rs.7,00,000/- are set out and the amount is reworked as due and payable as on 18.11.2003 being sum of Rs.2,92,86,955.35/- with interest accumulated from time to time. A direction was issued to file a further affidavit pertaining to the rate of interest charged in respect of the said amount and pursuant to the said direction, a further affidavit is filed dated 21.1.2005 mentioning therein that the interest rate charged is at the rate of 25% p.a. with quarterly rest. It is also mentioned that the said interest rate is contractual rate of interest.

4. Learned counsel for the respondent company has raised before me a preliminary objection as to the maintainability of the petition in view of the

enforcement of the provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 particularly section 17 thereof. The learned counsel for the respondent has relied upon the judgment of the apex court in the case of **Allahabad Bank vs. Canara Bank & Anr. reported in (2003) ALL MR 475** and has contended that in view of the provisions of section 31, proceedings in the nature of miscellaneous petition would not lie in this court because in cases of banks and financial institutions where the claim is of more than Rs.10,00,000/- an exclusive jurisidiction is conferred on the DRT and thus this court has no jurisidiction to entertain and try the present petition. He has also relied upon the judgment of this court in the case of **Maharashtra State Financial Corporation Ltd vs. Shri Naresh Kunjilal Gupta and Ors reported in 2003(2) ALL MR 667** in which the learned single judge of this court while dealing with the proceedings under section 31 and 31(aa) of the SFC Act has taken a view that in view of the provisions of section 17 of the DRT Act the proceedings would not lie in this court and the matter has to be transferred to the DRT. While

interpreting the section 31 the learned single Judge has taken a similar view that the DRT will have an exclusive jurisdiction in respect of the said proceedings and the same would stand transferred to DRT. On the other hand the learned counsel for the respondent has cited a judgment of the Delhi High Court in the case of **Industrial Finance corporation of India vs. M/s. Allied International Products Ltd reported in AIR 1997 Delhi 143** and has contended that the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act is an additional remedy and not in derogation of the provisions contained under section 31 and 31(aa) of the SFC Act. The learned Judge of the Delhi High Court has relied upon sub-section (2) of section 34 to come to the aforesaid conclusion. However in a connected matter though the issue did not directly arose, the apex court had an occasion to consider the provisions of section 34(2) of the Recovery of Debts due to Banks and Financial Institutions act, 1993. The Apex court has in the case of **Unique Butyle Tube Industries (P) Ltd vs. U.P. Financial Corporation and Ors reported in (2003)2 SCC 455** while considering the aforesaid

provisions has held as under :

> " Section 34 of the Act consists of two parts. Sub-section (1) deals with the overriding effect of the Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the Act. Sub-section(1) itself makes an exception as regards matters covered by sub-section (2). The U.P. Act is not mentioned therein. The mode of recovery of debt under the U.P. Act is not saved under the said provisions i.e. sub-section (2) which is of considerable importance so far as the present case is concerned. Even a bare reading therein makes it clear that it is intended to be in addition to and not in derogation of certain statutes; one of which is the Financial Act. In other words, a bank or a financial institution has the option or choice to proceed either under the Act or under the modes of recovery permissible under the Financial Act. To that extent, the High court's conclusions quoted above were correct. Where the High Court went wrong is by holding that the proceedings under the U.P. Act were permissible. The U.P. Act deals with separate modes of recovery and such proceedings are not relatable to proceedings under the Financial Act.

5. In my view in the case before the Apex court issue was whether U.P. Financial Corporation which was not covered by sub-section (2) of s.34 of the Act could maintain the proceedings before the Court or has to move the Debt Recovery Tribunal in the light

of the provisions of S.17 of the Act. The apex court has held that in cases where the banks and financial Corporation are covered by sub-section (2) of section 34 then the remedy by way of miscellaneous petition under the said SFC Act is saved and the proceedings are not required to be transferred to the DRT. Relying upon the aforesaid judgment the learned single judge of this Court (Mohta, J) has in the case of Miscellaneous Petition no. 13 of 2000 and Miscellaneous Petition no. 62 of 2001 in the case of Maharashtra state Financial Corporation and SICOM has held that by virtue of provisions of sub-sections (2) of s.34 this court will have jurisdiction to entertain the proceedings arising under State Financial Corporation Act, 1951. In my opinion the view of the learned single judge (Rebello, J.) in the case of 2003(2) ALL MR 667 Maharashtra State Financial Corporation vs. Naresh Kunjilal Gupta and Ors and also of the learned single judge (R.J. Kochar, J) in the case of Maharashtra State Financial Corporation Vs. Jai Bharat Leather Industrial Co-op. Producer Society Ltd. & Ors. in the case of Misc. Petition No.32 of 1997 are no longer a good law by

virtue of the subsequent judgment of the apex court in the case of Unique Butyle Tube Industries P.Ltd (supra) which in turn holds that by virtue of the provisions of sub-section (2) of section 34 the proceedings initiated under the provisions of the SFC Act is save and need not be transferred to the DRT. In any event in the aforesaid two judgments of the learned Single Judges did not notice the provisions of sub-section (2) of section 34 of the SFC Act, 1951 which specifically saves the proceedings initiated under s.34(2) of the said DRT Act and thus the same are per-incuriam and therefore cannot be accepted. On the other hand the learned single judge, Mohta, J has considered the judgment of the apex court in the case of Unique Butyle Tube Industries P.Ltd (supra) and has rightly come to the conclusion that this court shall have jurisdiction to continue and try the present proceedings by virtue of sub-section (2) of section 34 of the said Act which saves the proceedings initiated under the SFC Act, 1951. In view of the aforesaid judgment I reject the contention of the learned counsel for the respondent company that this court has no jurisdiction to try

and entertain the present proceedings.

Now turning to the case on merits the respondents who are the guarantors have raised the following defences.

(i) the claim is beyond the period of limitation and thus barred by the law of limitation.

(ii) that the sale of the properties of the principle debtors which is the company in exercise of power conferred under section 29 of the SFC Act, 1951 is illegal, invalid thus the sale proceeds received thereof is not accurate and correct.

(iii) that the petitioners did not obtain appropriate valuation report from the valuer before selling the said properties and thus sold the properties contrary to the well settled principles laid down by the apex court.

(iv) That the claim of the petitioner is highly exaggerated and the interest charged is at much excess rate than what is agreed and or provided in the circulars issued by the RBI.

6. In so far as the first contention is concerned about the limitation I do not see any merits therein. A case has been purpotedly put forward that the notice of recall was given to the principal debtor on 13.9.1996 and that the possession of the assets is taken on 8.10.1996 whereas the present petition is filed on 29.10.1996. According to the learned counsel for the respondent company the cause of action for filing of the present petition therefore, arises prior to 8.10.1996 and thus the petition being beyond the period of three years is barred by the law of limitation. I am of the opinion that the said contention is without any merits because the present petition is not for the recovery of amount against the company which is a principle debtor. The notice invoking the Bank Guarantee and for recalling of the

amount as well as action under section 29 for recovery of the assets against the principle debtor are two distinct cause of action and therefore, period of limitation cannot be counted on the basis of accrual of cause of action by interchanging the two. It is well settled that the liability of the guarantors is always in respect of the balance amount which the company as a principle debtor is not able to satisfy. In the present case admittedly the sale of the assets is much subsequent in the year 2002. The said guarantees are invoked some time in or about 9.3.1998. Thus the period of limitation would commence only from 9.3.1998. The petition is filed on 22.10.1999 and therefore the present petition is in time and not barred by the law of limitation. Turning to the next two contentions being no.(ii) & (iii) on behalf of the respondent that the sale of the assets of the sick industrial company namely the principal debtor is contrary to law and or that the same is effected without obtaining proper valuation report. I am of the opinion that, that issue does not arise in the present proceedings. It is always open to the respondent as a director of the company

as well as for the company itself to challenge the said sale by agitating the said issue in the appropriate proceedings. The present petition is only against the respondent as the guarantors and thus the issue as to the proper valuation or proper conduct of sale of the assets of the principle debtor cannot be determined in the present proceedings. In view thereof I reject the aforesaid contention no.(ii) and (iii) also accordingly.

7. This leads me to the last contention raised by the respondent company that the interest charged is excessive and / or wrongly computed. It has been also contended that the petitioners have failed to provide the details of rate of interest charged by them in accordance with the judgment of the apex court in the case of Ravindran (supra) and in view thereof the present petition is liable to be dismissed. According to the petitioner’s counsel the details as to the contractual rate of interest and computations thereof have been set out by the petitioner by filing two additional affidavits pursuant to the directions issued by this court and

they have disclosed not only the rate of interest charged but even the amount of interest payable. They have also given necessary credit in respect of the sale proceeds received from the sale of the assets and thus in my opinion they have properly accounted for their claims and thus the contention raised by the respondents has no merits. I accordingly reject the same.

8. In view of the aforesaid position in law I dispose off the present petition by passing the following order. :

(i) Respondent no.1 to 6 is ordered and directed to jointly and severally pay to the petitioner a sum of Rs.2,92,86,955.35 crores with interest thereon at contractual rate of interest of 21.5% p.a. with quarterly rest with effect from 18.11.2003.

(ii) Petition is also made absolute in terms of prayer clause (ii).

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